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IN THE

Supreme Court of the United States

October Term, 1956

No. 910

R. V. ARCHAWSKI, ET AL.,

Petitioners,

against

BASIL HANIOTI, ETC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDIX

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Petitioners, three hundred and fifty odd prospective passengers of the steamship "CITY OF ATHENS", pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit in the above entitled matter, following this Court's reversal of, and remand to, that Court on April 9, 1956 in the above entitled matter.

Opinions of the Courts Below

The opinion of the United States District Court for the Southern District of New York reported in 129 F. Supp. 410 (R. 317-324, Walsh, D. J., sitting in admiralty), is printed *infra* pages 5-11 in the Transcript of Record,* 40

* TR—refers to the printed Transcript of Record on file in this Court when this case was before it in the October, 1955 Term.
R—refers to the original typewritten record of the Courts below transmitted herewith.
A—refers to the Appendix in this petition.

copies of which are on file in this Court when this case was before it as Case No. 351, at the October, 1955 Term of this Court, 350 U. S. 532, same title.

The opinion of the Court of Appeals for the Second Circuit (Frank, Medina and Hincks, C.JJ., opinion by Medina, C. J.,* following remand) is annexed hereto *infra* pages A2-17 and is reported in 239 F. 2d 806.

The decision and order of the Court of Appeals for the Second Circuit denying petitioners a rehearing (Frank, Medina and Hincks, C.JJ., decision by Medina and Hincks, C.JJ.—Frank C. J. having passed away during the pendency of the petition therefor), is annexed hereto *infra* pages A-18 and is unreported.

Jurisdiction

The decision and judgment of the Court of Appeals for the Second Circuit and its order denying a rehearing, sought to be reviewed, were entered on December 26, 1956 and January 16, 1957, respectively.

Jurisdiction of this Court is found in 28 U. S. Code, Secs. 1254(1), 2101(c) and 2106.

Questions Presented

1. Where the effectiveness of an Admiralty Decree, providing for the restitution of unearned passage moneys, is jeopardized by the respondent's failure to post a supersedeas bond in lieu of satisfying the decree, as a condition precedent to perfecting an appeal and, where the respondent, prior to noticing his appeal and during the pendency thereof, has absconded and removed himself from the jurisdiction of the District and Appellate courts and remains concealed, whether the Court of Appeals had juris-

* The same panel reversed by this Court.

diction to review and reverse that portion of the Admiralty decree therein providing for the issuance of a body attachment against the respondent to induce his compliance therewith in aid of execution?

2. Where the laws of a State, in which the Admiralty Court is located, permit the issuance of a body execution against a judgment debtor in aid of execution, is the jurisdiction of the Admiralty court to issue an analogous writ dependent upon the technical rules of pleading of that State, or by the proofs as reconciled to the allegations of the libel under the admiralty rules of pleading?

3. Whether a District Court sitting in Admiralty, independent of the law of the State in which it is located, possesses inherent powers to order body attachments to induce compliance with its decrees and in aid of execution thereon?

Statutes Involved

"28 U. S. C. A. 2111. On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

"28 U. S. C. A. Supreme Court Admiralty Rule 2. In suits in personam the mesne process shall be by a simple monition in the nature of a summons to appear and answer the suit, or by simple warrant of arrest of the person of the respondent in the nature of a capias, as the libelant may, in his libel or information pray for or elect; in either case with a clause therein to attach his goods and chattels, or credits and effects in the hands of the garnishees named in the libel to the amount sued for, if said respondent shall not be found within the district. But no warrant of arrest of the person of the respondent shall issue unless by special order of the court, on proof of the propriety thereof by affidavit or otherwise."

"28 U. S. C. A. Supreme Court Admiralty Rule 3. In all suits in personam, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the state where an arrest is made on similar or analogous process issuing from the state court.

And imprisonment for debt, on process issuing out of the Admiralty court, is abolished, in all cases where, by the laws of the state in which the court is held, imprisonment for debt has been, or shall be hereafter abolished, on similar or analogous process issuing from a state court."

"28 U. S. C. A. Supreme Court Admiralty Rule 20. In all cases of a final decree for the payment of money, the libelant shall have a writ of execution, in the nature of a fieri facias, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the respondent, claimant, or stipulators. And any other remedies shall be available that may exist under the state or federal law for the enforcement of judgments or decrees."

"28 U. S. C. A. Sec. 2007. Imprisonment for debt. (a) A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished. All modifications, conditions, and restrictions upon such imprisonment provided by State law shall apply to any writ of execution or process issued from a court of the United States in accordance with the procedure applicable in such State.

(b) Any person arrested or imprisoned in any State on a writ of execution or other process issued from any court of the United States in a civil action shall have the same jail privileges and be governed by the same regulations as persons confined in like cases on process issued from courts of such State. The same requirements governing discharge as are applicable in such State shall apply. Any proceed-

ings for discharge shall be conducted before a United States Commissioner for the judicial district wherein the defendant is held."

"N. Y. Civil Practice Act, Sec. 764. *Issuance of execution against the person generally.* Subject to the exception specified in the next section (body execution against a female), an execution against the person of a judgment debtor may be issued by the court or a judge or justice thereof, upon application by the judgment creditor, in a case where the judgment can be enforced by execution, as prescribed by section 504 of this act, and where the plaintiff's right to arrest the defendant depends upon the nature of the action. The issuance of the execution shall rest in the discretion of such court, judge or justice. The application for the issuance of the execution may be made without notice, or with such notice as the court, judge or justice may direct, and shall be made by affidavit which shall set forth in detail the right of the party to the execution, the amount of the judgment, the amount unpaid, and the time and place where the execution against the judgment debtor's personal property has been returned or partially unsatisfied."

"N. Y. Civil Practice Act, Sec. 504. *Enforcement of judgment, by execution.* In either of the following cases a final judgment may be enforced by execution:

1. Where it is for a sum of money in favor of either party; or directs the payment of a sum of money.

2. and 3. (not pertinent)."

"N. Y. Civil Practice Act, Sec. 826. *Right to arrest depending upon the nature of the action.* A defendant may be arrested in an action, as provided in this and the next article (Article 48, Secs. 833-846), where the action is brought for either of the following causes:

1. through 8. (not pertinent).

9. In an action upon contract, express or implied, where it is alleged in the complaint that the

defendant was guilty of a fraud in contracting or incurring the liability, or that, since the making of the contract, or in contemplation of making of the same, he has removed or disposed of his property with intent to defraud his creditors, or is about to remove or dispose of the same with like intent; but where such allegation is made, the plaintiff cannot recover unless he proves the fraud on the trial of the action; and a judgment for the defendant is not a bar to a new action to recover upon the contract only."

"28 U. S. C. A., Supreme Court Admiralty Rule 22. All libels in instant causes, civil and maritime, shall be on oath or solemn affirmation and shall state the nature of the case, as, for example, that it is a cause civil and maritime, of contract, or a tort, or damage, or of salvage, or of possession, or otherwise, as the case may be; and, if the libel be in rem, that the property is within the district; and, if in personam, the names and places of residence of the parties so far known. The libel shall also propound and allege in distinct articles the various allegations of fact upon which the libelant relies in support of his suit so that the respondent or claimant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer for due process to enforce his rights in rem, or in personam, as the case may be, and for such relief and redress as the court is competent to give in the premises."

Statement of the Case

This cause was before this Court at the October, 1955 Term of this Court, via certiorari, upon the issues of jurisdiction of admiralty over the subject matter, and the sufficiency of pleadings in admiralty, in contrast to the technicalities of the common law and code forms. Those questions were resolved in petitioners' favor by unanimous reversal of the Second Circuit's decision on April 9, 1956, opinion (350 U. S. 532) delivered by Mr. Justice Douglas.

The substance of the case concerns the recovery by some 350 odd libelants of prepaid, unearned, passage monies paid for a promised transportation by sea on board the steamship "City of Athens" back in 1947, for which they received no transportation or their money back. The libel, dated September 16, 1952 (TR. 14) alleges that respondent, doing business in his own name, and in various trade names, owned and controlled the passenger vessel known as the "City of Athens" which he held out as a common carrier of passengers for hire and that the petitioners paid moneys for passage upon the vessel scheduled for a July 15, 1947, sailing to Europe and subsequent voyages. The libel then proceeds to allege the breaches of contracts with the petitioners and further alleges that the sums, paid by them as passage money, were wrongfully and deliberately applied by the respondent to his own use and benefit in reckless disregard of his obligations to refund the same and that he has since secreted himself away and manipulated his assets for the purpose of defrauding the petitioners. The libel further alleges that the trade names of the ostensible firms, under which Hanioti was operating when the petitioners paid their passage moneys and when the breaches occurred, were, in fact, Hanioti's alter egos and mere shams, created and used by himself for the purpose of shielding himself from liability for the fraudulent acts alleged to have been committed by him. The libel further alleges, that at the time that Hanioti and his alleged alter egos were soliciting the prospective passengers and receiving their prepaid passage moneys he, and his alter egos, were hopelessly insolvent. As of the date of the libel, the libel then states that Hanioti maintained a secret residence in New York, the location of which, after due diligence, could not be found and that he was then operating behind the trade name of another ostensible firm which was his alter ego and for which no address could be found. The libel prays for a decree in favor of the petitioners

to the extent of their respective passage moneys "and such other and further relief as in the law and justice they may be entitled to receive".

The District Court, in its Final Decree, found the allegations, contained in the libel (TR. 12, 13), to be amply supported upon the record and that the passage moneys procured from the petitioners by Hanioti, and his alter egos, were fraudulently procured; that the passage moneys were unearned and as such constituted constructive trust funds refundable to the petitioners when the vessel and her voyages were abandoned. The District Court also found that Hanioti, upon demand, refused to repay the passage moneys but actually converted them to his own use and the use of those for whom he was responsible.

In its Decree, the District Court (TR. 13) directs Hanioti to repay the passage moneys, with interest thereon, and further provides that unless the decree be satisfied within ten days from the date of service of a copy of the same, with notice of entry thereon, upon Hanioti's proctors or, unless execution upon the decree be stayed by an appeal with proper and approved security thereon during that ten-day period, that a writ of attachment against the person of Hanioti, to compel him to perform and obey the decree, be issued.

Hanioti then made three motions in the District Court: (1) to vacate the decree, (2) to vacate the provision therein for body attachment process, and (3) to stay the issuance of a writ of body attachment. The District Court held extensive hearings thereon and procured Hanioti's physical attendance by a directive to his proctors and then examined Hanioti under oath with respect to the propriety of issuing a writ of body attachment against him. In its opinion (TR. 5) (reported in 129 F. Supp. 410) the Court concluded that it was convinced that Hanioti was an "unbelievable scoundrel, indifferent to money judgments against him because he believes him-

self judgment proof under the ordinary methods of execution" and denied all of the motions made in his behalf. The District Court then considered whether, under the facts established and the law, body execution was appropriate. It then proceeded to point out that the nominal corporate owner of the "City of Athens" kept no proper books, had no separate bank account and that it, as well as the other ostensible firms named in the libel, were by Hanioti's own admission, "mere paper companies" whose assets were freely intermingled because it was "immaterial" to Hanioti in what name checks were made out or received; that all of the ostensible firms were in one group under the control of Hanioti. Citing good authority therefor the District Court held, that where the corporate form is used merely as an alter ego, or business conduit of a person, it may be disregarded to prevent fraud (TR. 8), and that the petitioners were entitled to recover from Hanioti upon the maritime contracts.

To aid in the enforcement of its decree (TR. 8-11) the District Court pointed to Supreme Court Admiralty Rules 3 and 20, and to specific sections of the New York Civil Practice Act which permit the issuance of writs or body execution in aid of enforcement, in the discretion of the Judge, where there was fraud in contracting or incurring the liability, *or where*, since the making of the contracts, the defendant has removed himself and disposed of his property with intent to defraud his creditors. It held Hanioti guilty of fraud, in making the contracts with intent not to perform and in incurring the liabilities because, at the time he entered into them he and his dummy corporations, which kept no records, were insolvent and he continued to accept passage moneys even after the arrest of the CITY OF ATHENS by lienors, knowing that he was insolvent and could not make the voyage.

As further ground for warranting the issuance of a body execution, the District Court, who observed and interrogated Hanioti upon the witness stand, found that since the making of the contracts and incurring the liabilities thereon he had removed his property and disposed of the same with intent to defraud pointing out in detail his diversion, without any satisfactory explanation of their whereabouts, of the unearned passage moneys which moneys it held to be constructive trust funds for the benefit of the petitioners.

Before issuing its writ of body execution, the District Court directed his lawyers to produce him and required Hanioti to take the witness stand and state, under oath, where he had been residing and where he had slept the previous evening. Hanioti swore that he had been living at 35-70 160th Street, Queens, New York, for three months past and had slept there the previous evening (R. 515). Immediately that day, January 11, 1955, execution against the property of Hanioti was issued by the Court and, as the U. S. Marshal's return of nolla bona thereon reveals, Hanioti had not even been near that address in three months (Marshal's endorsement on back of R. 316). Concurrent with its opinion order (TR 5) of February 9, 1955, the District Court issued its writ to the Marshal commanding him to attach the body of Hanioti, if he were found within the territorial jurisdiction of the Court (A. 19). Hanioti was never apprehended, having absconded from the jurisdiction as soon as he left the witness chair in the District Court. At the time his lawyers noticed his appeal, as well as during proceedings thereon, they admitted to Judge Medina, C. J. that Hanioti was in concealment contending that they had to await his long distance telephone calls to them in order to maintain contact with him.

The Circuit Court, twice, denied motions in his behalf to vacate, or stay execution on, the writ pending his appeal (R. XV, LII). Petitioners' motion to dismiss his appeal on the grounds of absconding, concealment, and failure to post

a supersedeas bond as required by the Decree, was adjourned to the hearing of Hanioti's appeal upon the merits (R. LXXIII).

When the Court of Appeals first erroneously reversed the District Court on the point of jurisdiction over the subject matter, the decree was vacated and the action dismissed in the District Court whereupon Hanioti was able to regain his passport and leave the country.

During the pendency of this action before this Court, Hanioti was sitting out this Court's determination on board of a vessel known as the "MARIANTHE" in one of the channel ports of Europe, which vessel he actually owned behind the mask of another dummy Panamanian corporation.

Upon remand to the Court of Appeals, pending further "proceedings in conformity with this (Court's) opinion" the panel, reversed by this Court, declined to enter its order, upon this Court's judgment, so that petitioners could be restored to status quo but, on June 8, 1956, put over to the October, 1956, Term further proceedings in the case, which enabled Hanioti to dispose of the "MARIANTHE".

On December 26, 1956, the Court of Appeals rendered its opinion, modifying the decree by deleting the provisions for body arrest therein, on the following grounds:

1. "We find not only that libellants' proof failed to establish any fraud which would justify an order of arrest under the New York statute, but also that the libel contains no such allegations, when tested in the light of the New York authorities." (A-10)
2. "The allegations (in the libel) of insolvency does not amount to a charge of fraud in the incurring of the obligation. A fixed intention not to perform is necessary • • • Whatever the state of mind of respondent, though, the sufficiency of the libel must be tested by its proper allegations." (A-11)
3. "Fairness to the defendant, whose very liberty may be at stake, demands that the complaint show une-

quivocally on its face whether a foundation is being laid for an order of arrest or a body execution." (A-12)

4. "We are not satisfied that such power (inherent power of an admiralty court to order body executions) exists. On the contrary, the fact that the Supreme Court has prescribed forms of execution for the admiralty courts leads us to believe that no others were intended. See Admiralty Rule 20." (footnote, A-8)

Hanioti remains concealed, surreptitiously slipping in and out of New York.

On January 16, 1957, the Court of Appeals denied petitioners' application for rehearing.

REASONS FOR ALLOWANCE OF THE WRIT

1. (a) By that portion of its decision, which deletes the provision in the Final Decree for body arrest, the Court of Appeals for the Second Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

In the first place, it would appear that the Court of Appeals improperly assumed jurisdiction to decide a hypothetical proposition of law over which it possessed no jurisdiction. To that Court's knowledge, respondent had absconded beyond the jurisdiction of the Court before, and pending, his appeal without posting any supersedeas as required by the rules and the provision in the Final Decree therefor. There was no action seeking a "Declaratory Judgment", or in the nature of a "*habeas corpus*" proceeding, or similar proceedings. The respondent had deliberately placed himself beyond the jurisdiction of the Court (just as he is today) frustrating the petitioners and jeopardizing their money judgment and making the customary "Supplemental Proceedings" an impossible farce. Were he apprehended while the Writ was outstanding,

under the admiralty rules he could avail himself of a procedure, analogous to that of the State, under which no honest debtor, without means of satisfying a judgment—and regardless of his initial fraud in incurring the liability—can be held to jail. Under that procedure, he must make a clean breast of his interests, sources of income, means and style of living, etc. in a candid manner. If the Court is satisfied as to his truthfulness and inability to pay anything on the judgment, he is released. If he is lying, the Court may impose additional jail sentence upon him for the perjury committed and other provisions respecting compliance with the decree. In the instant case before the Court, Hanioti had that opportunity in the District Court before that Court issued the Writ. He deliberately lied and, as amply shown by his own testimony, convinced the Court that he was "an unbelievable scoundrel indifferent to money judgments against him because he believes himself judgment proof under ordinary methods of execution." His *modus operandi* then, as when he procured the petitioners' passage money and, indeed, in the intervening years between 1947 and the Final Decree, was identical—as supported upon this record.

Aside from State law, the Court of Appeals holds that the District Court, sitting in admiralty, has no inherent power to order body executions. This emasculation of power reduces the U. S. District Courts, sitting in admiralty, to farcical shells beneath the dignity of a lowly J. P. or recorder's court, with leave and license to all and sundry to thumb their noses at the Court's orders because the Court is impotent to aid enforcement by means of body execution. It ascribes this emasculation, of inherent powers of the admiralty courts, to this Court's general admiralty rule 20.

(b) That part of the Court of Appeals decision, which limits the inherent powers of the District Court, sitting in admiralty, is contrary to decisions of this Court and decisions of other courts.

Thus, in *National Marine Cooks* v. *Arnold*, 348 U. S. 37, this Court has stated that,

> "Where the effectiveness of a money judgment is jeopardized by the judgment debtor, he has no constitutional right to an appeal extending that frustration."

The Court of Appeals declined to rule upon petitioners' motion to dismiss Hanioti's appeal in both, its original erroneous decision reversed by this Court, and its present decision for which this writ is sought. The language of this Court in *National Marine Cooks, supra,* is substantially the language used over a century ago in *Lane* v. *Townsend*, Fed. Cas. No. 8050, 14 Fed. Cas. 1090 (1835), wherein it was held that the powers of the admiralty courts are not restricted by the laws of the State in which they sit, but that they have inherent powers,

> "to give effect to their own judgment to prevent the defendant from absconding and avoiding process of the court thereby depriving the plaintiff of the benefit of his judgment."

By assuming jurisdiction to determine that question upon Hanioti's appeal, the Court of Appeals has condoned his conduct, extended the frustration, and conferred upon Hanioti a right of review to which this Court has stated he has no constitutional right.

2. The Court of Appeals has rendered a decision concerning an important question involving both, federal and state law, in conflict with applicable decisions of federal and state law.

Contrary to the oft stated doctrine, repeated by this Court in this case when it was before them, the Court of Appeals has, again, tested the sufficiency of the libel herein according to the technical rules of pleading of the State and not in accordance with the simple admiralty rule which frees the admiralty pleading from technical requirements. *Dupont De Nemours & Co.* v. *Vance,* 19 How. 162, 171-172; 2 *Benedict, American Admiralty* (6th Ed. 1940) para. 223, 237. Nor, has the Court of Appeals endeavored to extract the real situation from the whole record, reconciling the facts with the libel, and then determining the appropriate relief or whether, in fact, the relief granted below was an abuse of discretion. *The Syracuse,* 79 U. S. 382. Thus, where a right, supplementary to judgment, is granted by the laws of a State wherein a Federal Court is sitting, it has been held that the Federal Courts will enforce that right upon a substantial, equivalent, showing without regard to the precisional forms of pleading of the State, *Barney* v. *Chapman,* 21 Fed. 903. As said in 2 *Benedict, American Admiralty* (6th Ed. 1940) Para. 287, page 344,

> "The result of the cases seems to be that arrest in admiralty on mesne process may always be had if an arrest would issue out of a State Court on the same facts; arrest may also be had in an admiralty cause sounding in tort, upon special order of the judge. Arrest may not be had in ordinary cases on contract. And where a judgment debtor can be arrested on an execution, he has all the rights and privileges which a judgment debtor in a State court would have. The application for arrest must in *general* follow the State practice, *but it is not to be supposed that the technicalities and particularities of the State court practice would be demanded by the*

> *court, either on its consideration of the right to arrest or an application to vacate the warrant.''* (Emphasis supplied.)

Indeed, a fair reading of the libel herein (TR. 14, at 16) clearly shows that, "since the making of the contracts" (N. Y. Civil Practice Act, Sec. 826(9)), Hanioti engaged in the various manipulations, described in paragraph "sixth" and thereafter in the libel, all of which the District Court found to be substantiated upon this record. Upon this record, a series of dummy corporate setups by Hanioti, masterminding all of them, with a power of attorney in his pocket over their assets, as each was created, between the time he procured the petitioners' passage moneys and the filing of the libel on September 16, 1952, is clearly shown. That they were all dummies to insulate himself from these passengers and other creditors is also clearly shown. Yet, contrary to *McAllister* v. *U. S. A.*, 347 U. S. 932, with no indication whatsoever of error on the District Court's part, much less a showing that its findings are "clearly erroneous", or that "on the entire evidence it was left with the definite and firm conviction that a mistake had been committed", the Court of Appeals, in disregard of its duty, finds:

> "that libellants' proof failed to establish any fraud."

This distorted and unfounded interference with the forthright findings of the District Court is not only contrary to the doctrine stated by this Court, but is purely an arbitrary act grounded upon some radical concept of "liberty" because,

> "Fairness to the defendant, whose liberty *may* be at stake" (emphasis supplied)

apparently induced it to do something so that his apprehension could not come to pass and the decree, which it reluctantly affirmed on the merits, would become ineffectual.

Respecting fraud "in contracting or incurring the liability," as distinguished from the fraudulent acts subsequent thereto, the Court of Appeals cites *Morris* v. *Talcott*, 96 N. Y. 100 to support its conclusion, herein, that failure to disclose insolvency at the time of contracting is not fraud. The New York State Court of Appeals cases, cited by the Second Circuit, are the same cases cited by the District Judge. In those cases, commodity traders, persons continually purchasing on usual business credit terms, were involved. Thus, they could be insolvent one day but, by the due date on their respective purchases, they could be solvent. Obviously, there could be no presumption of fraud per se in such cases. Contrary to the findings of the U. S. District Court in Baltimore, Md., who saw and heard Hanioti in the *in rem* proceeding there, and the District Judge below, here, who also saw and heard him, both of whom disbelieved his testimony that he was turning over substantial sums of the petitioners' passage money to his principal creditor, Todd, the Court of Appeals after presumably reading the typewritten record concludes that a *fixed intention* on Hanioti's part *not* to perform is a necessary ingredient. It then proceeds to find, contrary to both Courts' disbelief, their findings, and the *McAllister* case, supra, that Hanioti

> "was making every effort to mollify his principal creditor (Todd), turning over to it *substantial sums of money as received*, and *evidently believed* that it would be content to be paid from the profits of future voyages." (Emphasis supplied) (A-11)

Novotny v. *Kosloff*, 214 N. Y. 12, 108 N. E. 189, cited by the Circuit Court as authority, is inapposite as the Circuit Court's digest of the case clearly indicates. Straining and groping, it resorts to a case *Frazier* v. *Tuttle*, not officially reported, but contained in *100 N. Y. S. 2d 534*, which is a decision by a Municipal Court judge in the Bronx in contrast to *Lehrer* v. *Nussbaum*, 133 Misc. 710, a decision by three judges of the Appellate Term, First Department,

which is the appellate court of review for Municipal Court decisions.

And, for the sake of argument, dignifying the decision in the *Frazier* case the situation in which, the same panel states, "was strikingly similar to libellants' theory of the *facts* alleged in the case at bar", we strangely find that the defendant offered to sell the plaintiff five identified *pool tables* and the plaintiff agreed to buy them. The plaintiff paid for them but, upon delivery, found that they were not the identical pool tables which the parties had agreed upon. The plaintiff sued to *rescind* the contract and recover the purchase price and asked for body arrest upon the ground of fraud. Because the record there showed that the defendant was financially able and could have acquired title to the identified pool tables, thereby complying with the agreement, the Court declined to hold him guilty of fraud at the time they entered into the agreement and consequently denied body execution. There, the plaintiff had received something for his money. In the case at bar, as both district courts found, Hanioti knew he was insolvent and unable to perform at the time he was taking the petitioners' passage moneys. In detail, they point out that the vessel was neither fueled, victualled, or stored for the voyage and the crew had been unpaid for several voyages previous to the scheduled voyage, all to Hanioti's knowledge while, outstanding against the vessel, were over one million dollars in lienable debts; all, while he was advertising and holding out the vessel to the public, receiving these petitioners' passage moneys, and disposing of them in an untraceable manner because neither he or his dummy corporations kept any books in that respect, despite the fact that these funds were unearned and deemed, in law, to be constructive trust funds.

Walker v. *Sanford*, 126 Misc. 597, 214 N. Y. Supp. 202, aff'd 217 A. D. 727, 216 N. Y. Supp. 932, is clearly inapposite. There is no similarity whatsoever in the alleged situ-

ation of the *Walker* case. That decision was a ruling, on motion, addressed to the sufficiency of a pleading in order to procure a warrant of arrest from the State court in order to *commence* the action. Indeed, in *Whittington* v. *Moore-McCormack,* 196 Fed. 2d 295, cert. den'd, the same Circuit declined to follow the decisions of two Appellate Divisions in a matter involving State law, distinguishing them upon the ground that they were decisions involving the construction of pleadings and reversed this writer on the law. The Court, in the *Lehrer* case, supra, cited by the District Court in support of the issuance of body arrest herein, carefully distinguishes the *Walker* case, supra, holding it to be inapposite.

The New York Court of Appeals in *Wright, et al.* v. *Brown,* 67 N. Y. 1, 6, a commodity trader case in which the defendant's business had grown bad and, because of his alleged illness and inability to attend to the same, he became discouraged and commenced transferring his property to the detriment of creditors, said:

> "Upon the case made by the plaintiffs the inference is legitimate that the defendant must have known when he purchased the barley that he could not continue in business, and that he could not pay for it; and this is confirmed by the close connection of events and by finally transferring all his property to his wife, including the malt so recently purchased of the plaintiffs. To what extent the denial and explanation of the defendant should be deemed to impair the case made by the plaintiff, depends partly upon the force to be given to, and inferences drawn from, the facts, the most important of which are undisputed. From the whole case both the Special and General Terms draw conclusions adverse to the defendant, and we cannot say that they were not justified by the facts, judging the defendant by the ordinary motives which influence men in the conduct of pecuniary affairs, and, therefore, within the general rule referred to, the decision of the court below should be deemed conclusive upon this court."

The Court affirmed the order of General Term, which had affirmed an order of Special Term, denying the defendant's motion to vacate an order of arrest.

And so, in the case at bar, there was a legitimate inference in the District Court that Hanioti must have known, when he was soliciting prospective passengers and receiving petitioners' passage moneys, that he neither could perform or remain in business where his only ostensible asset was the "CITY OF ATHENS", heavily indebted to threatening lienors far in excess of her market value. And, when he was disposing of these unearned passage moneys in an untraceable fashion he knew that these petitioners would be unable to attach them by process in admiralty as unearned "freights" to secure their refund because he had rendered them unidentifiable.

Judge Parker, of the Fourth Circuit, in a very scholarly opinion in the *Henry W. Breyer,* 1927 A. M. C. 290, 303, involving a similar situation as the case at Bar except that cargo rather than passengers was involved, stated:

> "The loss was occasioned by the complete failure of the ship to furnish the facilities which it held itself out to the community as possessing. The only reason for the failure of the vessel to break ground was the financial inability of the owner. It did not have the funds to coal the ship or pay the crew, and the vessel was consequently unable to sail. Having therefore failed in a duty imposed by law, the ship was guilty of tort and the shippers were entitled to recover the prepaid freight in an action of negligence.
>
> "On another ground, the shippers were justified in alleging that they were damaged by acts of the vessel which amounted to torts. *The complete financial inability of the owner of the vessel to comply with the obligations of a common carrier is so clearly shown by the testimony that it must have been known to the managers of the vessel when the cargo was taken aboard.* The action, therefore, in accepting the goods and *particularly in receiving the freight money in advance from the intervening libelants was in effect fraudulent.* The Navigation Corporation was doubtless insolvent and the situation was analogous to that which has

> frequently been before the courts in reclamation proceedings in bankruptcy. It is a general principle that when a person who is insolvent purchases goods with no intention of paying for them, and conceals his insolvency and intention not to pay, he is guilty of fraud which entitles the vendor to recover the goods. Knowledge of inability to pay when the purchase is made is equivalent to purchase with intent not to pay. Such purpose is constructively fraudulent. (Citations.) It was equally fraudulent for the ship to accept payment for services which she was clearly unable to perform.
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> • • •
>
> "the *real cause of the failure of the vessel to carry the goods was not the legal process* issued from this court, but her own inadequate resources as pointed out above. The legal process was the result and not the cause of the failure of the vessel to comply with her contractual and common law duties." (emphasis supplied)

The collated authorities in that decision comprise decisions of this Court and many other of the highest Courts in the nation which, in effect, characterize the common carrier as a "quasi-public official" in whom there is necessarily reposed a considerably great trust and who, reciprocally, is held to a greater standard and obligation than an ordinary commodity trader dealing in tangibles.

But, the Second Circuit declined to follow this well-established law, both State and Federal, and instead chose to follow a decision of the lowest Court of the Municipality of the City of New York as controlling in the premises. It completely disregarded the admitted transfers of property by Hanioti and his *modus operandi subsequent* to the accrual of the petitioners' causes of action and, indeed, during the pendency of this case in the District Court, in its own Court, as well as when before this Court and even to this date.

Permitted to stand, under all of the facts and circumstances attendant to the case at bar, that decision emasculates the U. S. District Courts, sitting in admiralty, of all enforcement powers over any of their orders or decrees. The rogue, with impunity, is thereby provided a well-lighted path to cheat and ignore the orders of an admiralty court because it has been rendered impotent to do anything but declare *what* the law is and give the suitor a decree stating that he is *entitled* to receive and be paid a certain sum of money. *Only*, if he can find it upon the rogue (should he locate him within the jurisdiction) or find property in his name within the jurisdiction, can the Court aid the suitor in executing its decree. But, if he has disposed of it in fraud of the suitor, then the rogue has the blessings of the Court and can continue happily on his way free as a bird, to cheat and cheat and cheat, with impunity. Should any District Court disagree with that decision, the absconding rogue is assured of an appeal, *in absentia*, by which the appellate court will insure that he is not disturbed, irrespective of the lower Court's orders, security to the judgment creditors, or the founded facts.

It is fantastic to even imagine, much less believe, that the Federal debtor act (28 U. S. C. A. 2007), or the State acts, were adopted by the respective legislators to protect the type of debtor involved here. Nor, is it conceivable that amended Supreme Court Admiralty Rule 20 was intended by this Court to render the District Courts, sitting in admiralty, impotent in situations such as here.

CONCLUSION

For all of the above reasons, a writ of certiorari, as prayed for, should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 9—October Term, 1956.

(Argued October 3, 1956 Decided December 26, 1956.)

Docket No. 23566

R. V. ARCHAWSKI, *et al.*,

Libellants-Appellees,

—against—

BASIL HANIOTI, etc.,

Respondent-Appellant.

Before:

FRANK, MEDINA and HINCKS,

Circuit Judges.

Appeals from a decree and an order of the United States District Court for the Southern District of New York, in admiralty. Lawrence E. Walsh, *Judge.*

Respondent appeals from a decree in admiralty directing him to pay libellants a sum of money and authorizing the issuance of a body execution, and from an order denying a new trial. Decree modified by deletion of the portion thereof relating to the body execution, and otherwise affirmed. Opinion below reported in 129 F. Supp. 410.

HARRY D. GRAHAM, New York City, *for libellants-appellees.*

LEONARD ALTSCHUL, New York City (Samuel Bader, New York City, of Counsel), *for respondent-appellant.*

MEDINA, *Circuit Judge*:

This proceeding was brought to recover sums of money paid by libellants[1] for passage upon the vessel City of Athens on a sailing to Europe scheduled for July 15, 1947, no part of which was repaid, despite the fact that the voyage was abandoned. When first before us we dismissed for lack of admiralty jurisdiction, and this holding was reversed by the Supreme Court and the case is again here for consideration of the contentions of respondent which were not previously passed upon. *Archawski* v. *Hanioti,* 350 U. S. 532, reversing, 2 Cir., 223 F. 2d 406.

Due in no small measure to various maneuvers and dilatory tactics by respondent, to whom the court below with considerable justification referred as "an unbelievable scoundrel," but also to confusion stemming from the allegations contained in the libel, the method of proof pursued by libellants and their determination at all hazards to enforce the decree by putting respondent in jail, what should have been a simple case comes to us encased in a mass of procedural complexities.

To bring some order out of this seeming chaos, we shall discuss only the following questions, which we think dispositive of the appeal:

1. Were the proceedings in the District Court regular.

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1 The parties are referred to by their designations in the court below.

2. Was the evidence sufficient to sustain a recovery by libellants against respondent for the passage money.

3. Was the provision in the decree for a body execution authorized by law.

I.

Respondent, through his proctors of record, filed a notice of appearance and a personally verified answer denying the allegations of the libel. When the case was reached for trial in due course, one of respondent's proctors of record appeared and requested an adjournment. When this was denied, he stated, "Then I will sit here and just see what is happening." The court proceeded to conduct an inquest, disavowing any intention to take advantage of the presence of respondent's proctor, who declined to take part in the proceeding. Under these circumstances it is clear that respondent was not represented at the inquest, and it is not necessary to consider whether respondent's proctor in fact represented him at that time. It is not material whether or not respondent personally knew that the case was about to be reached for trial. It was his business to keep track of the case and assert whatever defense he had.

While respondent's failure to appear may be referred to in a colloquial sense as a default, it was not properly speaking a default and did not admit all the properly pleaded and material allegations of the libel. His answer had put all these allegations in issue and libellants were accordingly put to their proof. *Bass* v. *Hoagland,* 5 Cir., 172 F. 2d 205, cert. denied, 338 U. S. 816. The court below was entirely justified in taking the inquest.

Following entry of the decree, respondent appeared by his present proctor and in effect moved for a new trial. The motion was denied in an opinion reported at 129 F. Supp. 410.

II.

We proceed to consider the sufficiency of the proofs adduced on the inquest in support of libellants' claim.

The Supreme Court has held "that the obligation to pay the moneys arose because of a breach of the contract to transport passengers" and that even where the libel reads like *indebitatus assumpsit* at common law, admiralty has jurisdiction "provided that the unjust enrichment arose as a result of the breach of a maritime contract." *Archawski* v. *Hanioti, supra,* pp. 534, 536.

Thus libellants, in order to recover, were obliged to establish no more than the making of the contracts of passage, the receipt of the passage money by respondent, the abandonment of the voyage and respondent's failure to reimburse libellants upon demand.

Libellants called no witnesses. They did introduce certain documentary evidence, consisting of the stenographic transcript of certain testimony before a Commissioner in a proceeding in 1947 in the United States District Court for the District of Maryland, the Commissioner's Report, and a schedule listing the amount each libellant had paid for passage on the anticipated voyage.

Respondent testified in the Maryland proceeding. By his own admissions it was established that a number of persons purchased passage aboard the City of Athens, that the money was collected by the American Mediterranean Steamship Agency, which disbursed the proceeds according to respondent's instructions, that the nominal owner of the ship, Sociedad Naviera Transatlantica, was "a mere paper company," completely under respondent's control and without even a bank account separate from respondent's other controlled companies, and that, although demands had been made for the return of the passage moneys, they had not been repaid.

The testimony of Walter J. Letts, president of the City of Athens' general passenger agency, was to the same effect. The only remaining essential proof in the case at bar had to do with the identification of the amounts paid by the several libellants. These were set forth in the schedule above referred to. Libellants' proctor stated to the court that the schedule had been prepared from the records of the passenger agency by its treasurer-director and had been identified by Mr. Letts, who had died since the Baltimore proceeding. The proctor stated that he had the original records with him in court, and undoubtedly would have placed them in evidence had an objection been raised to the introduction of the schedule in their stead.

Respondent contends that, except for his own testimony, this evidence was inadmissible hearsay, and that it may not be considered in determining whether there was proof sufficient to justify the decree. But it is well settled that objection to proffered hearsay is deemed waived by a party participating in a trial who fails to interpose a timely objection. In such a situation the hearsay may be received and weighed by the trier of the facts. *Diaz* v. *United States,* 223 U. S. 442, 450; *United States* v. *Fleming,* 2 Cir., 134 F. 2d 776, McCormick, Evidence, §§52, 54 (1954); 1 Wigmore, Evidence, §18; 3 Am. Jur., Appeal and Error §343. We think a party duly noticed of the trial may not immunize himself from such a waiver by absenting himself from the trial.

In the situation presented, we think the libellants were not entitled as of right to introduce the hearsay evidence. But neither was the absent respondent entitled as of right to have it excluded. We hold that its admission lay within the discretion of the judge. There were no facts suggesting doubts as to the authenticity or accuracy of the evidence. On the contrary, there was much to suggest affirmatively that the evidence was trustworthy.

Letts' testimony in large part coincided with respondent's admissions and was not inconsistent with them. As to the schedule, we think the court was justified in accepting the proctor's assurances as to its authenticity, and, since it summarized entries in the original records of the passenger agency, it was cogent evidence of the amounts paid by each of the libellants. We hold that the trial court did not abuse its discretion in not putting the libellants to stricter proof. Especially was this so in view of the fact (which the judge may have taken into account) that even after the entry of the decree it was still open to the respondent upon a showing of substantial injustice to make a timely motion for a reopening and correction of the decree. The *Eva D. Rose,* 4 Cir., 166 Fed. 101; cf. Fed. Rule Civ. Pro. 60(b). Although a motion for a new trial was made by respondent there was at no time any showing that the amounts claimed to have been paid by libellants were not correct.

Had there been any real defense to the claim for the repayment of the passage money it is fair to assume that respondent would have kept himself informed of the progress of the case on the docket and made some endeavor to refute libellants' proofs. We have no doubt whatever that he received the amounts paid and failed to refund them. The evidence amply supports that part of the decree which determines that respondent is indebted to libellants in the amounts stated.

III.

The real difficulty with the case concerns the provision in the decree for the issuance of a body execution.

We pass over as unimportant the specific wording of the decree. The file discloses a property execution returned *nulla bona* on January 11, 1955. We shall assume, *arguendo,* that there is a decree directing in proper form the issuance of a body execution, and that all preliminary formalities

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have been complied with, and thus cut right down to the basic question of whether this is an action in which a body execution may be obtained.

Libellants rely[2] on Admiralty Rule 20, which provides:

> "In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a fieri facias, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the respondent, claimant, or stipulators. And any other remedies shall be available that may exist under the state or federal law for the enforcement of judgments or decrees."

Under New York law, Civil Practice Act Section 764, an execution against the person, with certain exceptions not here pertinent, may issue in the types of cases defined in Section 826, which is entitled "Right to arrest depending upon the nature of the action." Libellants here rest their claim to be entitled to the body execution contained in the decree in this case on Subdivision 9 of Section 826, which provides that a defendant may be arrested:

> "In an action upon contract, express or implied, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability, or that, since the making of the contract, or in contemplation of making the same, he has removed or disposed of his property with intent to defraud his creditors, or is about to remove or dispose of the

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2 Libellants also contend that the district courts sitting in admiralty have inherent power to order body executions. We are referred to no authority in support of this proposition, and we are not satisfied that such power exists. On the contrary, the fact that the Supreme Court has prescribed forms of execution for the admiralty courts leads us to believe that no others were intended. See Admiralty Rule 20.

same with like intent; but where such allegation is made, the plaintiff cannot recover unless he proves the fraud on the trial of the action; and a judgment for the defendant is not a bar to a new action to recover upon the contract only."

Formerly, the old Code of Civil Procedure in New York, by Section 549, permitted an order of arrest based upon facts extrinsic to plaintiff's "cause of action." For example, an order of arrest might issue in an action on contract, if there was proof by affidavit "that the defendant was guilty of a fraud in contracting or incurring the liability," but plaintiff might recover judgment after trial, even if he failed to prove the fraud, provided he did prove the "cause of action" on contract. This was thought to be unfair to such a defendant, and by amendment in 1879, there was placed in Section 549 substantially the language now found in Subdivision 9 of Section 826, quoted above. Thus the allegation of "fraud in contracting or incurring the liability" became a substantive part of plaintiff's "cause of action," *Moffatt* v. *Fulton*, 132 N. Y. 507, 30 N. E. 992, and, in such a case, namely one where the complaint alleged a claim on contract, plus an allegation that "defendant was guilty of a fraud in contracting or incurring the liability," plaintiff's failure to prove the fraud at the trial would result in a dismissal of his complaint, even if he fully proved a claim for breach of contract. *Schlafer* v. *Heisner*, 73 N. Y. S. 2d 648. And, according to the New York statute, this would be true even if plaintiff obtained no order of arrest and never intended to apply for one. The mere inclusion of the allegation in the complaint, whether by inadvertence or otherwise, would require a dismissal of the action for failure of proof.

We cannot believe that a suitor in a federal admiralty court must suffer a dismissal of his complaint, despite the

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fact that he has fully proved a valid claim for relief in admiralty, simply because there may be found in the libel allegations which, when fairly construed, charge a fraud in "the contracting or incurring of a liability" on express or implied contract, or some other "extrinsic" facts such as are enumerated in Section 826(9). Thus, in our view, the New York system cannot be adopted in its entirety by the admiralty court. While it is true that Admiralty Rule 20 merely provides that "any other remedies" available under state or federal law for the enforcement of judgments or decrees shall be available, and thus might be thought to adopt that part of the New York statute which authorizes a body execution without adopting that part which relates to dismissing the complaint, we incline toward a different view. We think that since the New York statute was meant to authorize a body execution only where the plaintiff's failure to prove the fraud alleged would result in dismissal of his complaint, and since this is not the case in admiralty, the New York statute can have no application in a court of admiralty. Cf. 28 U. S. C. Section 2007.

But we find it unnecessary to make any broad ruling on the subject, as we find not only that libellants' proof failed to establish any fraud which would justify an order of arrest under the New York statute, but also that the libel contains no such allegations, when tested in the light of the New York authorities.

The libel alleges that at the time respondent held out the City of Athens as a common carrier of passengers for hire he was "hopelessly insolvent." There are other allegations that respondent acted improperly, but none of these charges the kind of fraud required by the statute, which is either (1) fraud in incurring the obligation or (2) disposing of property, in contemplation of or since making the contract, with intent to defraud creditors.

The allegation "That in addition to the aforesaid fraudulent acts of the respondent, he committed other transactions, made conveyances, assignments and other manipulations with the intent to deceive and in fraud of creditors," aside from any question of excessive generality, is insufficient, since the alleged fraudulent acts referred to would seem to have no relation whatever to the contracts of passage and serve only to indicate what an unscrupulous man libellants conceived respondent to be. It is not alleged that the transfers were made either in contemplation of or since making the contracts.

The allegation of insolvency does not amount to a charge of fraud in the incurring of the obligation. A fixed intention not to perform is necessary, and a condition of insolvency is not inconsistent with a hope of performance. The record in this case, by way of illustration, evinces an expectation that the ship would sail on schedule. Respondent was making every effort to mollify his principal creditor, turning over to it substantial sums of money as received, and evidently believed that it would be content to be paid from the profits of future voyages. Although this creditor did in fact libel the ship, there is no reason to believe that respondent did not hope and expect that it would forbear from doing so. Whatever the state of mind of respondent, though, the sufficiency of the libel must be tested by its proper allegations.

Under the law of New York, one who enters into a contract without disclosing a known condition of insolvency does not thereby become chargeable with fraud. In *Morris* v. *Talcott,* 96 N. Y. 100, it was held pages 107-8:

> "It is well settled in this State that an intent to defraud cannot be imputed to a party who contracts a debt knowing that he is insolvent, merely from the fact of his insolvency, and his omission upon a pur-

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chase of property upon credit to disclose such condition to his vendor. (*Nichols* v. *Pinner*, 18 N. Y. 295; 23 id. 264; *Wright* v. *Brown*, 67 id. 9; *People's Bank* v. *Bogart*, 81 id. 108.) A condition of known insolvency on the part of an intending purchaser of property, accompanied with an intention to acquire the property of his vendor without paying for it, constitutes such a fraud as will make the vendee liable to arrest in an action for the debt; but the intention not to pay can no more be inferred from the mere fact of insolvency, than the fact of insolvency can be inferred from the existence of an intention not to pay."

Fairness to the defendant, whose very liberty may be at stake, demands that the complaint show unequivocally on its face whether a foundation is being laid for an order of arrest or a body execution. In addition, since failure to prove a charged fraud will cause dismissal of even a meritorious claim, whether or not an order of arrest has been obtained, fairness to the plaintiff also requires that possible allegations of fraud be narrowly read. In the instant case, the allegations of fraudulent conduct are not cast in the terms of the statute and bear no discernible relation thereto. Certainly we can find nothing in the libel to indicate that at the time the libel was drawn libellants intended to rely upon Section 826(9).

In any event, whatever the intention of the pleaders, we hold that the libel does not allege a fraud within the meaning of the New York statute now invoked.

There is another reason why the allegations do not satisfy the statute, even if it be assumed *arguendo* that the libel charges that respondent fraudulently induced libellants to purchase passage aboard his ship. The question would remain whether there had been "fraud in contracting or incurring the liability" sued upon. The New York courts

have been hostile to the statute, representing as it does "a system of great severity, fruitful of oppression." This characterization appears in *Hathaway* v. *Johnson*, 55 N. Y. 93, 95, where it was held:

> "Statutes authorizing arrest and imprisonment for debt, although remedial in that they are designed to coerce, by means of the imprisonment, the payment of the creditor, are also regarded as penal, and ought not to be extended by construction so as to embrace cases not clearly within them."

In *Novotny* v. *Kosloff*, 214 N. Y. 12, 108 N. E. 189, plaintiff allegedly was fraudulently induced to enter into a contract of employment with defendant. When defendant later discharged plaintiff, thereby breaching the contract, plaintiff sued for damages, and the question arose "whether the fraud alleged was committed 'in contracting or incurring the liability' sued on." The court held it was not. The liability fraudulently incurred, said the New York Court of Appeals, was the liability to perform the contract, not the liability to respond in damages for failure to perform. The typical case under the statute, the court explained, involves the fraudulent obtaining of credit. In this situation the obligation to pay is the liability called for by the contract itself and accordingly is the liability fraudulently incurred. "But a liability to respond in damages for a non-performance of the contract in refusing to carry it out, • • • cannot be said to be incurred until the breach is actually committed and is unrelated to the fraud in the making of the contract."

We recognize that *Novotny* dealt with a case wherein the plaintiff sued on the contract relying on *subsequent* improper conduct by the defendant. A situation in which the plaintiff disaffirms the contract and relies on a promise

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implied in law *at the same time* the contract is made may be thought to be different. We think that *Novotny* applies here as well. The liability sued on *arises out of* fraud but is not fraudulently *incurred*.

Two lower New York courts, without referring to *Novotny*, have taken opposite views on whether the liability implied in law is fraudulently incurred. Compare *Lehrer* v. *Nussbaum*, 133 Misc. 710, 233 N. Y. Supp. 340 (yes), with *Walker* v. *Sanford*, 126 Misc. 597, 214 N. Y. Supp. 202, aff'd, 217 A. D. 727, 216 N. Y. Supp. 932 (no). A recent New York case, in which *Novotny* was invoked, however, squarely holds that that case precludes arrest where the obligation sued on is not that called for by the contract itself. *Frazier* v. *Tittle*, 100 N. Y. S. 2d 534. The situation in that case was strikingly similar to libellants' theory of the facts alleged in the case at bar. Defendant was accused of selling goods he was knowingly not in a position to deliver. Upon discovery of this fact, plaintiff demanded his money back and, not receiving it, brought suit, alleging fraudulent intent. The court held that the liability sued upon had not been fraudulently incurred and denied a body execution. We accept this interpretation of the *Novotny* decision. It is in line with the expressed policy of the highest court of New York that this statute should be narrowly construed.

Since the allegations of the libel are not sufficient to justify an order of arrest under New York law, the authorization of a body execution cannot stand. The decree must be modified by striking out the provision relating to the body execution, and as modified is

Affirmed.

FRANK, *Circuit Judge* (concurring):

I concur in the decision. I also concur in the opinion with one exception.

At the trial, where appellant was absent and unrepresented by counsel, the judge received in evidence an unauthenticated copy of the schedule of passengers' payments, and the money judgment the judge entered cannot be sustained with reliance on that evidence. I think there was no error here, because of these peculiar circumstances: When libelant's counsel offered the schedule, he advised the judge that, if necessary, he could introduce evidence authenticating it. I think the judge had discretion to rely on counsel's assurance on that score; moreover, respondent, in his motion for a new trial made no showing that the schedule in evidence could not have been authenticated.

What bothers me about my colleagues' opinion is that it seems, in part, to say this: (1) When a party is represented at a trial by a lawyer, if his lawyer does not object to the reception of hearsay evidence, he waives the objection. (2) If, then, a party and his lawyer fail to show up at a trial, the party waives, in advance, any such objection, at least to the extent that thereby he confers upon the judge discretion to receive hearsay evidence.

I think this a needlessly broad and dubious generalization. See, e.g., *Frazier* v. *Frazier's Executors,* 2 Leigh (Va) 642, 650; cf. *Lyman Co.* v. *Bechtell,* 55 Iowa 437. I have found no contrary decisions, and my colleagues cite none.

Although some of us consider the hearsay rule (in civil actions) generally undesirable, nevertheless it is a part of our legal tradition which courts may not disregard. The rule embodies the policy that that sort of evidence is unreliable. It is therefore inadmissible, as thus untrustworthy, unless inferentially the opponent assents to its reception. When a party's lawyer is present at the trial, his failure

to object to hearsay evidence usually constitutes assent by waiver; for otherwise he can lay a trap, concealing a defect on which he will rely if judgment goes against his client. See, e.g., *U. S.* v. *Rosenberg*, 195 F. 2d 583, 586 note 9 (C. A. 2). In such a situation, however, the lawyer exercises his judgment at the very time when the evidence is offered. But when the party and his counsel are not present at the trial, I think (1) the judge usually owes a duty to protect him by excluding hearsay of an important character, because it is deemed unreliable, and (2), if such a trial is by the judge without a jury, the judge should not ordinarily rest his decision on important hearsay which he has let in again because it is deemed unreliable. (I say "usually" and "ordinarily" to allow for exceptional circumstances such as those present in the instant case.)

For judges to indulge in broad generalizations is often delightful and sometimes essential. But I think we should usually not indulge in a generalization when it goes far beyond the need of deciding the case at hand and may be regarded as governing decisions in future cases, affecting other litigants not parties to that case and therefore unable now to voice their criticisms. As I said in an earlier opinion:[1] "The intended consequences of efforts to govern the future often fail; the actual consequences—which may be good or evil—are, frequently, utterly different. Results are miscalculated; there is an 'illusion of purpose.' Of course, present problems will be clarified by reference to future ends, but * * * such ends, although they have a future bearing, must obtain their significance in present consequences, otherwise those ends lose their significance. For it is the nature of the future that it never arrives. 'Tomorrow today will be yesterday.' Any future, when it becomes the present,

1 *Aero Spark Plug Co.* v. *B. G. Corp.*, 130 F. 2d 290, 292, 295, 296 (C. A. 2, concurring opinion).

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is sure to bring new and unexpected problems. There is much wisdom in Valery's reference to the 'anachronism of the future.' * * * Courts should be modest in their legislative efforts to control the future, since they cannot function democratically, as legislative committees and administrative agencies can, by inviting the views of all who may be affected by their prospective rules. And, because they do not learn those views, and must largely rely on their own imaginations, (judges) should be cautious about attempting, in present cases, to project their formulations too far and too firmly into the days yet to come. To cope with the present is none too easy, in part because the present is only a moving line dividing yesterdays and tomorrows, so that reflections on what will happen are unavoidable elements of current problems. But, although continuity, both backwards and forwards, is to some extent a necessity, judges should not shirk the present aspect of today's problems in favor of too much illusory tinkering with tomorrow's. The future can become as perniciously tyrannical as the past. Posterity-worship can be as bad as ancestor-worship."

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Order Denying Rehearing

Before: FRANK, MEDINA and HINCKS, *Circuit Judges.*

On Petition for Rehearing.

HARRY D. GRAHAM, New York City, Proctor for appellees-petitioners.

PER CURIAM.

Petition for rehearing denied.

HAROLD R. MEDINA,
CARROLL C. HINCKS,
C. JJ.

Filed: January 16, 1957.

Writ of Body Attachment

The President of the United States of America, to any United States Marshal within the Territorial Limits of this Court's Jurisdiction for the Execution of its Process, Orders and Decrees,

GREETING:

WE COMMAND YOU, that you attach Basil Hanioti, lately within the the jurisdiction of this Court, if he may be found within the territorial limits of this Court's jurisdiction for the enforcement of its process, order and decrees, and him safely keep, until he shall obey and perform a certain Decree of this Court, entered on the 6th day of December, 1954, made and pronounced in certain pleas, civil and maritime, therein lately depending, wherein R. V. Archawski, et al., were libellants, and the said Basil Hanioti was respondent, by which decree he the said Basil Hanioti was commanded to pay the sum of $130,383.69, and costs in the sum of $35.00, making in all the total sum of $130,418.69 with interest thereon at 6% from the 23rd day of July, 1947, within ten days from the date of service of a copy of said decree, with notice of entry, upon his proctors then of record, to the libellants' proctor for distribution amongst said libellants, and in default thereof or unless execution of said decree were stayed by an appeal with proper and approved security thereon during said ten day period, that the Clerk of this Court issue to the United States Marshal this Writ for execution.

WITNESS, the Honorable John C. Knox, Chief Judge, this 9th day of February, A. D. 1955, and in the 179th year of the independence of the United States of America.

WILLIAM O'CONNELL,
Clerk.

Approved:

LAWRENCE E. WALSH
U. S. D. J.

February 9, 1955.
(SEAL)